NO. 22566

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PLUMBERS & FITTERS, LOCAL 761,

Appellant,

vs.

MATT J. ZAICH CONSTRUCTION CO.,

Appellee.

APPELLEE'S BRIEF

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Appellee.

ERRATA SHEET
TO
APPELLEE'S BRIEF

The first word of the fifth line of the second paragraph on page 27 should be changed from "Appellant" to "Appellee".

The second word of the third line of the first paragraph on page 28 should be changed from "Appellant" to "Appellee".

Respectfully submitted,

MONTELEONE & McCRORY

By G. Robert Hale
G. ROBERT HALE
Attorneys for Appellee

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, GRACE ELLA COHEN, being first duly sworn, depose and say:

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action;

My business address is 5455 Wilshire Boulevard, Suite 1912, Los Angeles, California 90036.

On April 12, 1968 I served the within Errata Sheet to Appellee's Brief on the Appellant in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at 5455 Wilshire Boulevard, Los Angeles, California 90036, addressed as follows:

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Grace Ella Cohen
GRACE ELLA COHEN

Subscribed and sworn to before me this 12th day of April, 1968.

Sandra L. Wilmot
SANDRA L. WILMOT
Notary Public in and for the County of Los Angeles, State of California

My commission expires: October 18, 1969.

OFFICIAL SEAL
SANDRA L. WILMOT
NOTARY PUBLIC-CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY

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APPELLEE'S BRIEF

I.

STATEMENT AS TO JURISDICTION

The action below was brought by an employer, a building contractor, against a labor union for damages claimed to be due to the labor union's picketing. The United States District Court for the Central District of California had jurisdiction by reason of section 303 of the Labor Management Relations Act of 1947, as amended

/29 U.S.C. 187/, and 28 U.S.C. 1331 and 1337. The case is before the United States Court of Appeals for the Ninth Circuit on appeal from a money judgment in favor of plaintiff employer in the District Court. Timely Notice of Appeal was filed by the defendant on December 5, 1967. The jurisdiction of the United States Court of Appeals arises by virtue of the provisions of 28 U.S.C. 41, 1291 and 1294.

II.

STATEMENT OF THE CASE

Appellant Plumbers and Fitters Local 761 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, herein "Plumbers Union", is an unincorporated association and labor organization in which employees participate and which exists for the purpose in whole or in part of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment and conditions of work (Finding of Fact 7).

Appellee Matt J. Zaich Construction Co. is a California corporation and is a general engineering contractor duly licensed by the State of California (Finding of Fact 1). Appellee was one of two plaintiffs for whom judgment was rendered below. Appeal has been taken only from the judgment in favor of Appellee.

Appellee is one of two corporations wholly owned by Matt J. Zaich which are used to carry on Mr. Zaich's contracting business (203/18-20 and 204/5-7).1/

The other corporation, Zaich Company, was a member of the Associated General Contractors, herein "AGC", at the time of the dispute in question (276/23-277/5).

On or about July 27, 1962 Appellee was a member of the Underground Engineering Contractors Association, herein "UECA", an employer organization organized for the purpose of negotiating labor contracts on behalf of employer members with the collective bargaining representatives of their employees (Finding of Fact 9).

At that time, Appellee as a member of the UECA had a contract with the Laborers Union covering the work on the Calleguas Water Project (266/23-267/3). Zaich Company, through its membership in the AGC, also had a contract with the Laborers Union (264/6-13). The primary difference between the two contracts was that the AGC contract provided for settlement of jurisdictional disputes by the National Joint Board for the Settlement of Jurisdictional Disputes in the Construction Industry, herein

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1/ Bracketed numerals refer to page and line numbers of the transcript of the trial in the District Court. Thus, "203/18-20" refers to the testimony at page 203, lines 18-20. A citation such as "200/19-201/5" refers to the testimony at page 200, line 19 through page 201, line 5.

"NJB", while the UECA contract did not so provide (267/23-268/8).

Appellee and Zaich Company were separate legal entities, with separate business licenses, separate contractors' licenses, separate books and ledgers, separate bank accounts, separate tax returns, and separate profit sharing plans which had been separately qualified by the Internal Revenue Service (275-289). Zaich Company was a member of the AGC from 1955 to 1962 (276-277). Appellee was never a member of the AGC (285/6-8). Appellee and Zaich Company each have separate labor agreements (267/11-15).

The Plumbers Union attempted to secure an agreement from Appellee whereby its members would perform the work in question (11/20-24). Failing in this, and a subsequent attempt to secure the work through economic action (11/24-12/6), it invoked the procedures of the NJB and submitted the controversy for decision by that body (12/7-12).

Following notification to the Appellee and to the Laborers Union by the NJB that the controversy was before it for settlement and that it would hold a hearing on the dispute, Appellee sent a wire through the UECA to the NJB that it would not be bound by any determination of that Board (12/13-22). Likewise, the Laborers Union also refused to make any submission to the NJB as requested (12/23-24).

Thereupon, the NJB made a determination of the dispute based upon the matters before it, and it awarded the work to the Plumbers Union. It so notified all parties on September 28, 1962. The picketing which was the subject of the suit below was that picketing by the Plumbers Union, commencing on November 29, 1962, which had as its object that which was stated on the picket signs: That the Appellee was "not conforming with decision of NJB" (12/2-10).

As a result of this picketing, a work stoppage occurred. The picketing was for the purpose of inducing compliance with the NJB decision awarding the work to the Plumbers rather than the Laborers (13/11-14/3). In December 1962, upon the petition of the Regional Director of the National Labor Relations Board, the picketing was enjoined by the District Court under section 10(l) of the Labor Management Relations Act [29 U.S.C. 160(l)]. And on August 23, 1963, the National Labor Relations Board, in a 10(k) proceeding [29 U.S.C. 160(k)], determined that Appellee Matt J. Zaich Construction Co. was not the alter ego of Zaich Company, that Appellee therefore was not bound by any decision of the NJB and that the work was properly assigned to employees represented by the Laborers Union. 144 N.L.R.B. 133 (1963).

III.

QUESTIONS PRESENTED

1. Where Appellant has committed an unfair labor practice as defined by section 8(b)(4)(D) of the Labor Management Relations Act of 1947, must it continue to commit such practices after the N.L.R.B.'S determination before a right to recover will arise under section 303 of the Labor Management Relations Act?

2. Should the separate legal existence of Matt J. Zaich Construction Co. and Zaich Company be disregarded for the purpose of finding them to be a single entity?

3. Is the recovery of legal fees incurred by Appellee proper under the facts and the law of the case?

IV.

SUMMARY OF ARGUMENTS

1. Section 303 provides for damages to any person injured by a labor organization's conduct if such conduct is an unfair labor practice as defined by section 8(b)(4) [29 U.S.C. 158(b)(4)] of the Labor Management Relations Act.

Prior to 1959 the United States Supreme Court held that it was unnecessary to have a prior administrative decision for a cause of action to arise under section 303. In 1959 section 303 was amended and in place of the previously enumerated unfair labor practices, the unfair labor practices of section 8(b)(4) were incorporated by

reference into section 303. Since 1959 numerous cases have held that the amendment had no change on the prior decisions and that now, as prior to 1959, it is unnecessary to have a prior administrative decision for a cause of action to arise under section 303.

2. Appellee and Zaich Company are separate legal entities. There is no reason in law or fact to consider them as a single business. The trial court as well as the N.L.R.B. have held as a finding of fact that they are separate.

The Appellant itself has by its actions treated the Appellee and Zaich Company as separate legal entities.

3. The trial court found under the evidence presented that the legal fees prayed for by Appellee were in fact incurred by Appellee in the amount awarded. Such a finding should not be disturbed in the absence of a showing that it was clearly erroneous.

V.

ARGUMENTS

A. As A Matter of Law Defendant Committed An Unfair Labor Practice Within The Meaning Of Section 8(b)(4)(D) Of The Labor Management Relations Act Of 1947 And Therefore Violated Section 303 Of The Labor Management Relations Act.

It is the Appellant's contention that section 303(a)(4) read in light of section 8(b)(4)(D) renders

illegal only such picketing as takes place after and in the face of a determination by the Board that the acts complained of were unfair labor practices. Appellant is making the same argument made by the Union in the case of International L.& W.U. v. Juneau Corp., 342 U.S. 237 (1952). In the Juneau Spruce Case the International Longshoremen's and Warehousemen's Union established a picket line at a lumber mill to force the assignment of loading lumber barges to its members. The work had previously been assigned to members of the International Woodworkers of America by the employer, Juneau Spruce Corp. As a result of the picketing, the employer's lumber mill was shut down. The employer brought suit in the Federal District Court in Alaska for damages sustained as a result of the shutdown caused by the picketing. A jury awarded damages of $750,000.00 to the employer, Juneau Spruce Corp. The Court of Appeals of the Ninth Circuit affirmed the judgment. The Supreme Court granted certiorari, and in its decision the Supreme Court construed the provisions of the Act that are here in issue.

In its appeal to the Supreme Court the Union made the identical argument as that being put forth by the Appellant in Argument A of its brief, i.e., that section 303(a)(4) read in light of section 8(b)(4)(D) renders illegal only such picketing as takes place after and in the

face of a determination by the Board that acts complained of were unfair labor practices.

In the Juneau Spruce Case the Court stated:

". . . Certainly there is nothing in the language of section 303(a)(4) which makes its remedy dependent on any prior administrative determination that an unfair labor practice has been committed. Rather, the opposite seems to be true. For the jurisdictional disputes proscribed by section 303(a)(4) are rendered unlawful 'for the purposes of this section only,' thus setting apart for private redress, acts which might also be subjected to the administrative process. The fact that the Board must first attempt to resolve the dispute by means of a section 10(K) determination before it can move under section 10(b) and (c) for a cease and desist order is only a limitation on administrative power, as is the provision in section 10(K) that upon compliance 'with the decision of the Board or upon such voluntary adjustment of the dispute,' the charge shall be dismissed. These provisions, limiting and curtailing the administrative power, find no counterpart in the provision for private redress

contained in section 303(a)(4). Section 303(a)(4) as explained by Senator Taft, its author, 'retains simply a right of suit for damages against any labor organization which undertakes a secondary boycott or a jurisdictional strike.'

"The right to sue in the courts is clear, provided the pressure on the employer falls in the prescribed category which, so far as material here, is forcing or requiring him to assign particular work 'to employees in a particular labor organization' rather than to employees 'in another labor organization' or in another 'class.'"

In 1959 Congress passed the Labor-Management Reporting and Disclosure Act. In this amendment, instead of setting out the unfair labor practices at length, the statute was amended in section 303(a) to read as follows:

"It shall be unlawful, for the purposes of this section only, in any industry or activity affecting commerce, for any labor organization to engage in any practice or conduct defined as an unfair labor practice in section 158(b)(4) of this title."

Therefore, instead of having two identical sets of unfair labor practices set out in the code, we

have one enumeration of unfair labor practices in section 158(b)(4) and then their incorporation by reference in section 303(a).

In 1964, subsequent to the 1959 amendments to the Labor Management Relations Act, the Supreme Court again in the case of Teamsters Local 20 v. Morton, 377 U.S. 252 (1964), reviewed the sections that are before this Honorable Court. In the Morton Case the Supreme Court noted in the footnote at page 283:

> "Certain amendments to section 303 were made by the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat 545, 29 USC (Supp. IV) section 187, but these amendments are not germane to the questions presented in this case."

At page 285, the Supreme Court stated:

> "Section 303(b) of the Labor Management Relations Act expressly authorizes state and federal courts to award damages to any person injured by certain secondary boycott activities described in section 303(a). The type of conduct to be made the subject of a private damage action was considered by Congress, and section 303(a) comprehensively and with great particularity

'describes and condemns specific union conduct directed to specific objectives.' Carpenters Local 1976 v. Labor Board, 357 US 93, 98, 2 L ed 2d 186, 1193, 78 S Ct 1011."

The Supreme Court then in footnote 13 of the herein stated proposition said:

"Section 8(b)(4), 29 USC section 158(b)(4), and section 303, 29 USC section 187, ' have an identity of language' but specify two 'different remedies.' Longshoremen v. Juneau Corp. 342 US 237, 244, 96 L ed 275, 281, 72 S Ct 235. Section 8(b)(4) provides that certain conduct constitutes an unfair labor practice for which an administrative remedy is afforded. The same conduct under section 303 also gives rise to a claim for damages cognizable in either state or federal courts. As a consequence of the 1959 amendments to the Act, section 303 now incorporates by reference the prohibitions embodied in section 8(b)(4)."

In Teamsters Local 20 v. Morton, supra, the Supreme Court in effect recognized International L. & W.U. v. Juneau Corp. as still being the law of the land.

In 1966 the United States Court of Appeals, Second Circuit, in Old Dutch Farms, Inc. v. Milk Drivers

& Dairy Emp. Union, 359 F.2d 598 (1966), had a case arising under section 303 which originated in 1962. In this case, the Union sought to induce employees of a neutral employer (a supplier of Old Dutch Farms, Inc.) to engage in work stoppages and to threaten such employer in an effort to cause such employer to cease doing business with Old Dutch Farms, Inc. In March 1965, Old Dutch Farms, Inc. brought suit against the Milk Drivers and Dairy Employees Local Union No. 584 for damages under section 303(a). The Court at page 602 stated as follows:

> "The resolution of the present controversy requires (1) a determination of whether the union violated Section 8(b)(4) of the NLRA,[7] and (2) an assessment of the actual business injuries sustained by the employer."

Footnote 7 provides as follows:

> "Prior to the commencement of this action, the NLRB determined that the union had violated section 8(b)(4) of the NLRA. It should be noted, however, that a prior determination by the Board is not a prerequisite to an action by an employer under section 303. The administrative and judicial actions and remedies are viewed as

entirely independent, i.e., section 303 suits constitute a clear exception to the exclusive jurisdiction of the NLRB over alleged unfair labor practices. . ."

In 1967 in the case of Public Constructors, Inc. v. Electrical Workers (IBEW) Local 400, in the United States District Court in the District of New Jersey, 55 L.C. para 11883, the Union made the identical contention that Appellant is making before this Honorable Court. The United States District Court in New Jersey stated as follows:

"They contend that before an action can be properly instituted under Section 303 of the Labor-Management Relations Act of 1947 it is necessary to have a determination by the National Labor Relations Board that an unfair labor practice took place. To appreciate defendants' claim it is necessary to examine the statute.

"Section 303, as amended by the Landrum-Griffin Act of 1959 provides:

"'SEC. 303(a) It shall be unlawful for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor

practice in Section 8(b)(4) of the National Labor Relations Act, as amended.'

"Prior to the 1959 amendment, Section 303 set forth the entire language contained in Section 8(b)(4) of the National Labor Relations Act. As a result of the 1959 amendment -- the section was modified to incorporate Section 8(b)(4) by reference rather than repeating the language of Section 8(b)(4) in toto.

"Defendants contend that there must have been some valid reason for the amendment. They reject plaintiff's assertion that it was merely a 'scrivener's preference for abbreviated language.' Instead, defendants argue that the reason for the amendment was that Congress wanted the National Labor Relations Board to exercise its expertise before subjecting labor unions to monetary damages. . .

"In effect, defendants are claiming that the 1959 amendment resulted in a legislative overruling of the case of International Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp. . . .

"We compliment the defendants on the ingenuity of their argument; however, we

reject it. In arriving at our decision, we find it most significant that there is nothing in the legislative history accompanying the 1959 amendment which supports defendants' contention. If Congress had intended to legislatively overrule the Juneau case, we are confident that they would have so indicated. In the face of a silent record, we will not attribute to Congress an intent to reinterpret Section 303 by such subtle means. . . "

The United States District Court of New Jersey no doubt was referring to the legislative history of the Labor-Management Reporting and Disclosure Act of 1959, reported in 1959 U.S. Code Cong. Adm. News 2318, et seq., wherein this amendment is discussed in detail and nowhere is it inferred that Congress intended such a change in the law.

This argument was also rejected in Franchi Const. Co. v. Local No. 560 of Int. Hod Carriers, etc., 248 F.Supp. 131 (1965), and Taube El. Contr., Inc. v. International Bro. of E.W., L.U. No. 349, 261 F.Supp. 664 (1966).

B. Matt J. Zaich Construction Co. And Zaich Company Are Separate Corporations And No Legal Or Factual Basis Exists For Finding Them To Be A Single Enterprise.

1. In Fact and in law Matt J. Zaich Construction Co. and Zaich Company are separate legal entities. Appellant argues that Matt J. Zaich Construction Co. and Zaich Company should have been held to have been a single entity by the Court and that, if held to be such a single entity, the Appellee, Matt J. Zaich Construction Co., would be bound by the decision of the National Joint Board by Zaich Company's membership in the Associated General Contractors. These arguments were made before the National Labor Relations Board and, after reviewing the evidence, the Board determined that the two companies were in fact separate and held that the Associated General Contractors' contract was not binding on Matt J. Zaich Construction Co.

A finding of alter ego must in each case depend on the facts of that specific case. The uncontroverted facts before the trial court in this case sufficiently demonstrated the separateness of the two corporations. It was established that the two corporations were separate legal entities with separate State contractors' licenses, had separate City business licenses, had separate books and ledgers covering financial affairs, filed

separate tax returns, had separate bank accounts, had separate profit sharing plans which were separately qualified by the Internal Revenue Service, and that neither corporation had ever authorized the other to act on its behalf or to conduct business on its behalf or act as an agent on its behalf (275-289). If anything, the evidence in the record was more extensive and persuasive than that before the National Labor Relations Board when it considered the question. An analysis of the cases cited by Appellant should further demonstrate the Appellee's position.

As authority for the proposition that Matt J. Zaich Construction Co. should be bound to the National Joint Board decision by the membership of Zaich Company in the Associated General Contractors "for purposes of Federal Labor Policy", Appellant cites several cases. None of those cases, however, is based on facts like those present in the case at bar, nor do they stand for the argument Appellant seeks to make here.

The case of Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 549 (1964), is cited in Appellant's brief (page 22) for the proposition that parties may be obligated to abide by arrangements not necessarily of their own choosing. This case, however, involved a corporate merger where a successor corporation had absorbed

a predecessor corporation. The Court noted that under New York and general corporation law such a merger would not extinguish the merged corporation's obligations, but based its decision upon the factual continuity of identity of the companies.

N.L.R.B. v. Schnell Tool & Die Corporation, 144 N.L.R.B. 385 (1963), enf'd 359 F.2d 39 (6th Cir. 1966), is cited for the proposition that the N.L.R.B. has set up a standard for holding several corporations to be one. In fact, both corporations were joined before the N.L.R.B. for unfair labor practices committed by both corporations.

A.M. Andrews Co. of Oregon v. National Labor Rel. Bd., 112 N.L.R.B. 626 (1955), enf'd 236 F.2d 44 (9th Cir. 1956), cited in Appellant's brief (page 26) is another successor case. In this instance, the successor corporation took over the assets and operations of a defunct corporation in the guise of a creditor, but without foreclosure or any other form of court action, and then attempted to deny responsibility for the predecessor's acts. This is merely another case in which a successor stepped into the shoes of a predecessor corporation while refusing to recognize its responsibility.

Pizza Products Corporation v. N.L.R.B., 369 F.2d 431 (6th Cir. 1966), enf'g 153 N.L.R.B. 1265 (1965),

cited in Appellant's brief (page 25), likewise sets no standard for all cases, but rather applied a finding of fact by the N.L.R.B. in this particular case as to the singleness of two corporate entities for jurisdictional purposes in order to take action against the employer for unfair labor acts.

N.L.R.B. v. City Yellow Cab Company, 344 F.2d 575 (6th Cir. 1965), is cited by Appellant (page 24) for the proposition that two corporations separated for tax purposes would not bar their being considered a single business in relation to federal labor policy. As admitted by Appellant, the two corporations were considered as one employer solely for purposes of establishing a jurisdictional minimum to enable the N.L.R.B. to act.

Finally, Appellant cites 21 N.L.R.B. Annual Reports 14-15 (1956) as setting a standard for treating separate corporate entities as one. An inspection of this authority reveals it sets a standard purely for jurisdictional purposes and even then notes that no one factor can be controlling.

The above cases serve only to illustrate the futility of attempting to construct, as Appellant does, an alter ego upon the specific factual elements contained in other cases. It has regularly been held that the conditions under which a corporate entity may be disregarded

necessarily vary according to circumstances in each case and that each case must be decided upon its facts. Stark v. Coker, 20 Cal.2d 839 (1942); Kohn v. Kohn, 95 Cal.App.2d 708 (1950); Automotriz, etc. De California v. Resnick, 47 Cal.2d 792 (1957); I Fletcher Cyclopedia of Corporations, pages 134, 136, 143 and 165.

Although in rare cases the separate existence of two corporations will be discarded in order to prevent or punish an unfair labor practice by the employer, in no case has the separate existence of two corporations been discarded to excuse an unfair labor practice by a union.

There has never been introduced any evidence whatever that Appellee had used the separate corporate identities to commitany acts detrimental to the Union. To the contrary, the Appellant now seeks to excuse its unfair labor practices by arguing that two separate legal entities should be treated as one.

The facts adduced at the trial by both Appellee and Appellant are entirely consistent with the nature of closely held corporations which are recognized by law and commercial practice. The closely held corporation is a unique and practical business reality and has been recognized as such. As stated in the Hastings Law Journal:

"Once the limited liability concept is justified it should not be disregarded because of the mere fact that the shareholders are few in number, or that they perform all the corporate functions without conforming to corporate formalities, or that they are in a 'unity of interest' with the corporation. . . It should be the character of the transaction rather than the character of the corporation upon which shareholder liability is based."

Oppenheim, The Close Corporation in California - Necessity of Separate Treatment, 12 Hastings Law Journal 227, 231 (1961).

Nothing has been introduced which would make applicable the doctrine of alter ego under the principles followed by the courts.

The cases cited by Appellant itself make it clear that piercing the corporate veil is not the automatic result of the normal relationships by closely held corporations, but the courts' specific equitable device to prevent an injustice resulting from an instance of the improper use of the corporate entity. It is a remedy applied to prevent a grave injustice. Dashew v. Dashew Bus. Machines, 218 Cal.App.2d 711 (1963).

This idea has been stated in many cases in the form of two requirements for the finding of an alter ego.

". . . It has been stated that the two requirements for application of this doctrine are (1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow."

Automotriz, etc. De California v. Resnick, 47 Cal.2d 792 (1957); Minifie v. Rowley, 187 Cal. 481 (1921).

On such a rational basis it is not difficult to see how cases such as Schnell, Pizza or A. M. Andrews, where an employer commits unfair labor practices against a union and then seeks to hide behind a corporate shield arrived at their decision. But none of these factors is present here. It is not enough that a party has been damaged or that a finding of alter ego would give him the relief he seeks, even where there is close relationship between entities. Associated Vendors, Inc. v. Oakland Meat Co., 210 Cal.App.2d 825 (1962). In each of the cases cited applying the doctrine, the Court has found a course of dealing intended and organized for the purpose of improperly defeating the outsider and causally related to his predicament or the injustice complained of. Various types of improper use of corporate entity are shown by the

cases holding alter ego to apply, but in each there is a relationship between the improper dealing and the outsider's predicament. This element was made clear by the Court in Carlesimo v. Schwebel, 87 Cal.App.2d 482 (1948).

It is submitted that Appellant seeks a curious misapplication of the doctrine of alter ego. Starting with the desired result -- that the Appellee be found bound by the National Joint Board decision -- it has listed and analyzed a long list of the ties between two separately organized corporations. Although these ties existed long before the dispute or the facts in question, are in themselves the normal and practically inevitable concomitants of operating closely held, commonly owned, separate corporations, and although they have no causal relation to the injustice alleged, they are somehow given sinister significance when combined and recited seriatim.

As for the method and type of incorporation, capitalization and management of the two corporations owned by Mr. Zaich, each and every one of the factors argued by Appellant (Appellant's Brief, pages 23-29) are the entirely proper and common result of the single ownership of separate closed corporations. Indeed this method of operation with multiple corporations is quite widely used in construction corporations for reasons entirely unrelated to labor agreements. Use of a single office,

lease of equipment, common directors and officers, single ownership, separate licenses (as required by law), use of the same persons at different times as employees on the payroll of one or the other corporations, personal guaranties by the sole stockholders of all corporate debts, allocation of debts and credits between corporations and control by the chief executive officer of labor as well as other policy matters have not been and could not be seriously challenged as improper per se. As a matter of fact, all of these factors were present as a matter of general practice of the corporations years before the conflict with the Appellant arose. Further, they have no causal relationship with the legal reality of which the Appellant complains: -- That the Appellee, a corporation, was not a member of the Associated General Contractors or subject to the National Joint Board ruling.

Finally, Appellant has argued that the trial court's finding of fact that Zaich Company was not the alter ego of Matt J. Zaich Construction Co. (Appellant's Brief, page 29) should be treated as a conclusion of law. This position is refuted by Appellant's own cases. In Yellow Cab, the N.L.R.B. upheld the trial examiner's finding of fact that the two corporations should be treated as one. In both Pizza Products and A. M. Andrews the Court upheld the N.L.R.B.'S finding of fact that the two corporations should be treated as one.

The trial court has weighed the evidence and concluded as a finding of fact that Matt J. Zaich Construction Co. was not the alter ego of the Zaich Company. This finding, therefore, should not be set aside unless it was clearly erroneous. Rules of Civil Procedure for the United States District Courts, Rule 52.

2. The Appellant treated Matt J. Zaich Construction Co. and Zaich Company as separate entities. Zaich Company was a member of the AGC (276-277). As a member of the AGC, Zaich Company was bound to the Master Labor Agreement (267/20-22). Appellant, as a member of the Central Trade Council, was therefore a party to a contract with Zaich Company. Appellee was the employer on the jobsite; yet, despite this prior contract, Appellant came to the jobsite and sought, unsuccessfully, to get Appellee to sign a separate contract with it (Stipulation of Fact 6). If, as Appellant contends, Appellee is the alter ego of Zaich Company, why did Appellant seek a separate contract with it? By its own conduct, Appellant Union has treated Appellee Matt J. Zaich Construction Co. and Zaich Company as separate employers. This is consistent with Appellee's and Zaich Company's policies of separate labor agreements for each company (267/11-15).

C. The Court Properly Awarded As Damages The Legal Fees Expended By Matt J. Zaich Construction Co.

The evidence is undisputed that the law firm of Hill, Farrer & Burrill was paid $12,951.64 in legal fees and costs resulting from picketing by Appellant and the ensuing legal processes before the United States District Court and the National Labor Relations Board. Of this sum, one-third was paid by the Zarubica Company (a co-plaintiff in the action in the trial court), one-third was paid by UECA and one-third was paid by Appellee (Plaintiff's Exhibits "1" and "2").

Appellant has argued that there was "no evidence of any work performed by attorneys hired by Appellee in securing an injunction to enjoin the picketing." (Appellant's Opening Brief, page 31). Witnesses for Appellant testified that there was no United States attorney present at the 10(k) proceeding, and that each Union and each charging party were represented by their own counsel (145/11-21).

The Court may take judicial notice of the opinion of the National Labor Relations Board in the 10(k) proceeding when it stated that:

> "Briefs filed by the employers, the Laborers, and the Associated General Contractors have been duly considered."

144 N.L.R.B. at 134.

This indicates that the Government did not even file a brief in this matter and that the attorneys for Appellant and Zarubica Company were doing the actual presentation of evidence in the presenting of the case before the National Labor Relations Board.

Appellant further argues that legal fees involved in the handling of a section 10(k) hearing are not recoverable (Appellant's Opening Brief, page 32). Appellant can cite no case to support this contention. To the contrary, in fact, section 303 of the Labor Management Relations Act of 1947, subparagraph (b), provides that:

> "Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

It is true that some legal fees would be for the 10(k) hearing. However, this hearing was part and parcel of the entire controversy.

The Court is respectfully asked to take judicial notice of the court file in the injunction

proceeding, No. 62-1623-CC. The temporary restraining order signed by Judge Carr on February 4, 1963 (as well as the Judge's prior restraining order on December 18, 1962) does not stand alone, but was specifically conditioned upon and required the Appellee to proceed to a final determination by the National Labor Relations Board as a condition to the continuance of the restraining order.

Judge Carr's order at page 2, lines 24-26, states that Appellant was "enjoined and restrained pending final disposition of the matters herein involved now pending before the N.L.R.B.", and again at page 3, lines 21-26:

> "It is further ordered that this case remain open on the docket of this court pending final disposition of the matters involved herein pending before the National Labor Relations Board and that upon final disposition of said matters by the said Board and upon compliance by respondents with the terms, provisions and obligations of the within order petitioners shall cause this proceeding to be dismissed."

It is thus submitted that the restraining order was inextricably tied to the N.L.R.B. proceeding and that Appellee had no choice but was, in effect, ordered by the Court to proceed to a final determination by the National Labor Relations Board and thereafter upon final

determination and compliance to dismiss the injunction proceeding. This was done as ordered and the dismissal was signed by Judge Hall on November 19, 1963.

Had Appellee secured an unqualified restraining order and then voluntarily incurred additional expenses in securing a determination not necessary to keep the job open, Appellant's argument might have some reality. Such was not the case here and the order itself makes clear that the further proceedings were ordered and required for the effectiveness of the restraining order and that Appellee should be repaid for the expenses therein incurred.

Appellate Courts have repeatedly ruled that attorneys' fees actually spent by a plaintiff in removing the picket line and in proceedings before the National Labor Relations Board in prosecuting an unfair labor practice charge are recoverable in a "303 action". Aircraft and Engine Maintenance, etc. v. I. E. Schilling Co., 340 F.2d 286 (5th Cir. 1965); Construction and Gen. Lab. Loc. U. No. 438 v. Hardy Eng. & Const. Co., 354 F.2d 24 (5th Cir. 1965); Local Union 948, Int. Bro. of Teamsters, etc. v. Humko Co., 287 F.2d 231 (6th Cir. 1961). In Gulf Coast Bldg. & Const. Tr. Coun. v. F. R. Hoar & Son, Inc., 470 F.2d 746 (1967), the Court, in allowing the recovery of attorneys' fees incurred in filing an unfair labor practice action with the National Labor Relations Board, said:

"The attorney fees to which appellants object are those which appellee sustained in removing appellants' pickets and, as such, were proper items of damages. The contention that such fees are not allowable is wholly without merit."

VI.

CONCLUSION

Based on the foregoing, the Record on Appeal and matters of which this Court may take judicial notice, the judgment of the District Court should be sustained.

Respectfully submitted,

MONTELEONE & McCRORY

By Darrell P. McCrory
DARRELL P. McCRORY
Attorneys for Appellee

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

Darrell P. McCrory

DARRELL P. McCRORY

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, GRACE ELLA COHEN, being first duly sworn, depose and say:

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action;

My business address is 5455 Wilshire Boulevard, Suite 1912, Los Angeles, California 90036.

On April 11, 1968 I served the within Appellee's Brief on the Appellant in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at 5455 Wilshire Boulevard, Los Angeles, California 90036, addressed as follows:

BRUNDAGE & HACKLER
CHARLES K. HACKLER
JULIUS REICH
PAUL CROST
1621 West Ninth Street
Los Angeles, California 90015

Grace Ella Cohen
GRACE ELLA COHEN

Subscribed and sworn to before me this 11th day of April, 1968.

Sandra L. Wilmot
SANDRA L. WILMOT
Notary Public in and for the County of Los Angeles, State of California

OFFICIAL SEAL
SANDRA L. WILMOT
NOTARY PUBLIC-CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY

My commission expires: October 18, 1969